



Court of Appeals Clarifies Reach of Attorney-Client Privilege With Respect To Internal Investigation Documents

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On June 27, 2014, the United States Court of Appeals for the District of Columbia Circuit overturned *Barko v. Halliburton*, a recent district court decision concluding that certain reports generated as a result of a company's internal investigation were not protected from disclosure by the attorney-client privilege because they were not created for the primary purpose of seeking or providing legal advice.¹ Specifically, the district court had found that the corporate defendant, KBR, failed to show that "the communication would not have been made 'but for' the fact that legal advice was sought"; rather, according to the district court, the internal investigation at issue was a routine investigation, required by regulatory law and corporate policy, and thus, the internal investigation documents were not eligible for privilege protection. On writ of mandamus, however, the Court of Appeals in *In re Kellogg Brown & Root, Inc.* held that the district court erred in its ruling.

I. THE COURT OF APPEALS' DECISION

The Court of Appeals opined (in contrast to the district court in *Barko*) that the assertion of privilege in the case before it was "materially indistinguishable" from the assertion of privilege in *Upjohn v. United States*, the seminal U.S. Supreme Court decision finding that the attorney-client privilege applies in the context of internal investigations and covers communications between the company's employees and its counsel. According to the Court of Appeals in *In re Kellogg*, both cases involved a corporate defendant that "initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct," and in both cases, the investigation was conducted under the auspices of in-house attorneys, acting in their legal capacity.

The Court rejected as irrelevant several distinctions that *Barko* drew between the case before it and *Upjohn*, concluding that the privilege status of the internal investigation documents was not diluted by the fact that the internal investigation was conducted:

- in-house, without input from outside counsel;
- by non-attorneys (at the direction of the company's in-house legal department); and

¹ See *In re Kellogg Brown & Root, Inc., et al.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014). See also *United States ex rel. Barko v. Halliburton*, No. 05-cv-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014); Joseph M. McLaughlin, *Corporate Litigation: Privilege and Work Product in Internal Investigations*, N.Y.L.J., Apr. 10, 2014.

- in such a way that interviewed employees were not “expressly informed that the purpose of the interview was to assist the company in obtaining legal advice.”

“More broadly and more importantly,” in the Court’s words, the Court of Appeals disagreed with the district court that “KBR’s internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors . . . to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing” and that accordingly, the purpose of the investigation was not to obtain legal advice. The Court rejected the district court’s “but for” test, under which communications would not be safeguarded by the attorney-client privilege unless their sole purpose was to obtain or provide legal advice. The Court of Appeals warned that such an approach, which has no legal precedent, “would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry.” The Court, therefore, concluded that “[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation” or otherwise conducted pursuant to company policy.

Having concluded that “one of the significant purposes” of KBR’s internal investigation was to obtain legal advice and that the district court erred in applying the “but for” test, the Court engaged in a mandamus analysis, ultimately concluding that the district court’s error justifies granting a writ of mandamus.

II. IMPLICATIONS OF THE DECISION

The *In re Kellogg* decision settles much of the uncertainty generated earlier this year by *Barko* regarding the application of the attorney-client privilege in the internal investigations context. While the application of the attorney-client privilege is necessarily fact-specific, *In re Kellogg* restores some of the predictability attendant to the availability of the privilege in the business setting:

- During the course of an internal investigation, communications made to or from non-attorneys acting as agents of counsel are protected to the same extent as communications with counsel. Accordingly, where non-attorneys conduct employee interviews at counsel’s behest, in-house counsel should carefully document their requests of these non-lawyers, as well as the fact that their activities are vital for counsel’s provision of legal advice to the company.
- While informing interviewed employees of the legal purpose of the investigation could bolster an argument that the communication is protected by the attorney-client privilege, the company is not required to use “magic words” for the privilege to apply (at least where interviewed employees (1) were aware that the company’s in-house legal department was conducting a sensitive investigation and that the information they provided would be protected from disclosure, and (2) were told not to discuss the interviews without the general counsel’s express authorization).

- An internal investigation conducted for more than one primary purpose, one of which is to obtain or provide legal advice, may still be accorded the protection of the attorney-client privilege.
- While the Court stated that the involvement of outside counsel in a company's internal investigation is not necessary to the application of the privilege, retaining outside counsel can be helpful in strengthening the assertion of the attorney-client privilege and possibly reduce the risk of an adverse privilege decision along the lines of the district court's decision in this case.

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